Supreme Court, U.S.
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No. 01-1591

IN THE

Supreme Court of the United States

ULLICO INC., MRCO, INC., THE UNION LABOR LIFE INSURANCE COMPANY, FINANCIAL FREEDOM SENIOR FUNDING CORPORATION, and BEVERLY MIRTLE, LIFE INSURANCE COMPANY, FINANCIAL FREEDOM SENIOR FUNDING CORPORATION, and BEVERLY MIRTLE,

Petitioners,

v.

CORINNE E. BLACK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT

REPLY BRIEF

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8 pages

STATEMENT PURSUANT TO RULE 29.6

Petitioners Rule 29.6 Statement was set forth at page *iii* of their Petition for a Writ of Certiorari, and there are no amendments to that Statement.

1. Respondent asserts that Petitioners' own evidence raised a triable issue of fact on the issue of preemption, pointing to a choice of law provision in the applicable deed of trust by which California law is purported to govern the loan documents and their construction. Opp. 25-26. Neither the trial court nor the Court of Appeal made any such finding, and plaintiff did not assert it below. In California summary judgment practice, issues not raised in the trial court may not be asserted for the first time on appeal. *Webster v. Southern Cal. First Nat. Bank*, 68 Cal. App. 3d 407, 416-417 (1977); *North Coast Business Park v. Nieldsen Construction Co.*, 17 Cal. App. 4th 22, 29 (1993).

In any case, it is the Note, and not the Deed of Trust, that contains the provisions concerning which Respondent complains in this action. Respondent's Complaint does not seek any relief from the lien of the Deed of Trust nor any reallocation of the rights and liabilities it creates. 1 JA 2, 30-31[1].

The Note directly addresses the choice of law issue in pertinent part as follows: "This Note shall be governed by the laws of the State of California except to the extent of any overriding federal law or conflicting federal law that preempts state law." 2 JA 361, 367.

The Freedom Plan Loan Application and Commitment, which Respondent signed, similarly provides that "This Application/Commitment and all other Loan Documents shall be governed by the laws of the State of California except as such laws may be preempted by Federal law (such as Garn-St. Germain Act)." 2 JA 448, 457. The parenthetical reference at the end of this quotation is particularly apt because the Parity Act is itself part of the Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982).

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1. "__ JA __" refers to the volume and page of the Joint Appendix submitted by the parties to the California Court of Appeal in lieu of a Clerk's Transcript pursuant to California Rules of Court, Rule 5.1.

Thus, there can be little question that the parties recognized the supremacy of federal law in this transaction. Giving full credit to the language of the Deed of Trust, all that Respondent can assert is that the Note, which acknowledges the supremacy of federal law, must, according to the Deed of Trust, be construed under California law. Respondent does not suggest that California law would not give effect to a provision which thus recognized the supremacy of federal law. By statute, California has codified the common law preference for interpretations which would give effect to — as opposed to those which would make void — such provisions. Cal. Civ. Code § 3541.

The decision in *United States v. Stewart*, 523 F.2d 1070 (9th Cir. 1975), on which Respondent relies, is not to the contrary. *Stewart* involved an individually negotiated loan transaction in which the parties struck from both the note and deed of trust a provision adopting the Veterans' Benefits title of the United States Code, leaving only a provision adopting California law. The Ninth Circuit applied California law to restrict the lender's foreclosure rights. However, the Ninth Circuit later acknowledged that the individual negotiation of the *Stewart* agreement "is not critical to our determination" of whether state law may have a role in the regulation of federal benefit programs. *Whitehead v. Derwinski*, 904 F.2d 1362,1372 n.8 (9th Cir. 1990). Instead, the Ninth Circuit applies the tests of *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979): "(1) whether the issue requires 'a nationally uniform body of law'; (2) 'whether application of state law would frustrate specific objectives of the federal programs'; and (3) whether 'application of the federal rule would disrupt commercial relationships predicated on state law.' " (*Kimbell Foods*, 440 U.S. at 728-29).

However, *Kimbell Foods* applies only "when Congress has not spoken." *Id.* at 727. In the Parity Act, Congress acted to "eliminate the discriminatory impact" of imposing fifty sets of laws on state-chartered housing creditors while federally-chartered lenders were required to comply with only one so

that "those [housing] creditors will have parity with federally chartered institutions." S. CONF. REP. NO. 97-641, at 94 (1982). Congress then exempted qualifying alternative mortgage transactions from "any State constitution, law or regulation." 12 U.S.C. § 3803(c). Since Congress has acted to create a rule of decision for alternative mortgage transactions, *Kimbell Foods* and its progeny do not apply to undermine the determination of Congress.

Finally, it must be noted that Respondent offers no authority for the proposition that private contracting parties may elect by contract to be governed by state law to the exclusion of federal law or to relinquish the benefits and protections conferred by federal law. In the analogous area of ERISA preemption, most federal courts have refused to allow a choice of law provision to trump the intentions of Congress in mandating uniform federal regulation. *Prudential Ins. Co. of Am. v. Doe*, 140 F.3d 785, 790-91 (8th Cir. 1998) ("The choice of law provision in the [benefits plan] does not alter the outcome here, for parties may not contract to choose state law as the governing law of an ERISA-governed benefit plan"); *Morton v. Smith*, 91 F.3d 867, 871 (7th Cir. 1996) (choice-of-law provision does not control because the "federal common law of ERISA preempts most state law in regulating the interpretation of benefit plans"); *In re Sears Retiree Group Life Ins. Litig.*, 90 F. Supp.2d 940, 950-51 (N.D.Ill. 2000) ("A choice of law provision does not operate to waive the applicability of federal law regarding interpretation of an ERISA plan.").

To permit parties to choose state over federal law in the mortgage field would undermine the carefully-crafted regulatory scheme created by Congress to govern mortgage lending, excusing, for example, compliance with the Real Estate Settlement Practices Act, the Truth in Lending Act, the Truth in Lending Simplification and Reform Act, the Equal Credit Opportunity Act, Regulation Z and Appendix K and many other statutes adopted for the benefit of both borrowers and lenders.

2. Respondent further asserts that Petitioners failed to offer any evidence to support their standing to claim preemption, asserting that none of them is or was licensed by the State of California. Opp. 28-29. However, Respondent fails to note that she relies on claims of agency, conspiracy and *alter ego* to hold Petitioners responsible for a loan made by another entity, Freedom Investment Fund, Inc. 1 JA 2, 5, 18, 20. Freedom Investment Fund was proven to be licensed by the State of California and to be regularly engaged in the business of making loans, credit sales or advances secured by interests in residential real property. 2 JA 278, 284, 400. Respondent further overlooks the allegation of her own Complaint that Petitioner ULLICO Inc. is the transferee of the reverse mortgage interests of Petitioner Financial Freedom Senior Funding Corporation (1 JA 2, 19), another licensee which was proven to be engaged in the mortgage lending business. 2 JA 284.

The Parity Act expressly extends its protections to transferees of the designated housing creditors. The term "housing creditor" includes "any person who regularly makes loans, credit sales or advances secured by interests in [residential real property and dwellings] or . . . any transferee of any of them." 12 U.S.C. §§ 3802(2)(C) and (D). Therefore, respondents are "housing creditors" as defined by the Parity Act, because they regularly made loans secured by interests in residential real property or were transferees, *alter egos,* or agents, of such lenders or transferees. Respondent cannot be heard to claim that Respondents are *alter egos* of housing creditors to the extent that their "individuality and separateness has ceased," according to her Complaint (1 JA 2, 20), and at the same time claim that the Respondents are not entitled to the protections pertinent to housing creditors under federal law.

3. Respondent asserts that her claims do not stand as an impediment to the making of alternative mortgage transactions that comport with the applicable federal regulations, but that, quoting the Court of Appeal, "they simply require adequate disclosures." Opp. 9. This assertion is at odds with Respondent's

own description of her claims which go beyond seeking disclosure of the terms of the transaction to dispute the substance and terms of the transaction itself. Opp. 25.

Disclosures, however, are an integral part of the lending process, as the Office of Thrift Supervision has shown by its adoption of 12 C.F.R. § 560.2. Section 560.2(b)(9) expressly preempts state regulation of loan disclosures by federal savings banks.

The disclosures for this loan were proven to include an example of the projected maturity value of the associated certificate of deposit, a Truth in Lending Disclosure under the federal Truth in Lending Act, a Notice of Right to Cancel pursuant to the federal Truth in Lending Simplification and Reform Act of 1980, and a five page proprietary disclosure covering the Freedom Plan, the loan documents, and the risks of the transaction. In addition, Respondent received a Fair Lending Notice under California law, a Mortgage Servicing Disclosure pursuant to the Real Estate Settlement Procedures Act ("RESPA"), a Good Faith Estimate of Settlement Costs also pursuant to RESPA, a Controlled Business Arrangement Disclosure Statement, an Advisor Disclosure, and a detailed Loan Application and Commitment. Indeed, the only disclosures which Respondent claims not to have received are ones of her own devising which have never been authorized or required by any legislative or regulatory body. Given the panoply of disclosures expressly required by federal law, Congress can hardly have contemplated the adoption of new ones by fifty sets of state courts and legislatures and a myriad of individual litigants.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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